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No. 06-246

Supreme Court, U.S.
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In The
Supreme Court of the United States

JOHN F. McLEAY, M.D.,

Petitioner,

v.

BERGAN MERCY HEALTH SYSTEMS CORP.,
doing business as Bergan Mercy Medical Center,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Nebraska

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Nebraska Supreme Court decision lacks finality for Writ of Certiorari jurisdiction under 28 U.S.C. § 1257.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the Nebraska Supreme Court Opinion upholding immunity under the Health Care Quality Improvement Act ("HCQIA") does not conflict with the decision of another state court of last resort or of a United States Court of Appeals.

III. Whether the Petitioner has presented compelling reasons to grant the Petition for Writ of Certiorari, where the Nebraska Supreme Court Opinion upholding the provisions of the HCQIA putting the burden of proof upon a physician to prove that a reasonable jury could find that the peer review process was unreasonable does not conflict with the decision of another state court of last resort or of a United States Court of Appeals and where a physician never assigned as err or the said burden of proof standard.

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INTRODUCTION

The Nebraska Supreme Court decision is not a final judgment. The case was remanded back to the District Court for further proceedings on Petitioner Dr. McLeay's claim for equitable relief seeking reinstatement of hospital privileges.

Petitioner has failed to present any "compelling reason" for his Petition for Writ of Certiorari to be granted. See Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate that the Nebraska Supreme Court's Opinion is in conflict with a decision of another state court of last resort or of a United States Court of Appeals. See Sup. Ct. R. 10(b).

Furthermore, with respect to the standard of review issue set forth in HCQIA not only does the Nebraska Supreme Court decision not conflict with the decision of a state court of last resort or the United States Court of Appeals, but physician did not even raise an issue to the Nebraska Supreme Court challenging the standard of review set forth in the HCQIA statute.

STATEMENT OF THE CASE

Bergan Mercy Health Systems, Corp. ("Bergan") was sued by Dr. John F. McLeay ("McLeay") after a Peer Review Board suspended his hospital privileges. Initially, McLeay's privileges were restricted because of concerns about the quality of care he provided. McLeay accepted and agreed to the Ad Hoc Committee Meeting Minutes that required him to be monitored during certain surgical procedures.

Contrary to McLeay's claim that he was never found to be liable for incompetence, negligence or malpractice, the Ad Hoc Peer Review Committee that considered the matter found and stated:

> The members reviewed all of the information made available to the Committee through its investigative process. It was determined significant evidence was present in order to justify a recommendation for action. This evidence included two concern reports from nursing staff on the floors, two concern reports from nursing staff in the surgery department, two concern reports from anesthesiologists, and a number of cases identified as having inappropriate or substandard care.

Bergan did, as required by federal law, made a report to the National Practitioner's Data Bank that McLeay had been suspended because of "incompetence, negligence and malpractice."

In December of 1993, McLeay wrote a letter requesting reinstatement and acknowledged that "1992 was an aberration of my surgical care" and stated that he had his "wake-up call." When Bergan denied the request for reinstatement and when Bergan notified McLeay of further specific concerns, McLeay made a request for a hearing. Bergan informed McLeay of its concerns about a surgical judgment or techniques in eight specific cases, informed McLeay of a report from a monitoring physician concerning the care of three patients, an internal medicine physician's concern about a patient, and documentation regarding two patients. Additionally, Bergan's record numbers relating to cases were listed in a letter sent to McLeay providing notice of a hearing on the matter. McLeay did not attend the hearing and Bergan informed

McLeay he was suspended. McLeay was then informed of his right to a hearing before the Medical Executive Committee and in fact, requested such a hearing. A hearing was scheduled before the Medical Executive Committee but then postponed at McLeay's request and, subsequently, was never rescheduled by McLeay. Instead, McLeay filed the within lawsuit. Although McLeay had been suspended because of incompetence, negligence and malpractice, based upon the investigation of the Ad Hoc Peer Review Committee, no final administrative hearing was held on the matter because of McLeay's request to cancel the hearing and because of the lawsuit filing.

Bergan was sued by McLeay for breach of contract and breach of bylaws. Initially, the case was tried to a jury and McLeay was awarded a verdict. The jury verdict was appealed then vacated by the Nebraska Court of Appeals due to error in the admission of expert testimony. On remand, Bergan filed an Amended Petition asserting additional claims. The District Court granted Bergan's Motion for Summary Judgment based upon the immunity provisions under HCQIA for hospitals engaged in peer review activity.

McLeay appealed to the Nebraska Supreme Court and the Nebraska Supreme Court initially reversed the summary judgment remanding the case for trial, but then later granted Bergan's Motion for Rehearing and reversed itself. This time the Supreme Court affirmed the District Court's grant of summary judgment on the grounds that Bergan was immune from damages under HCQIA, but reversed and remanded on the equitable claim of reinstatement.

On appeal to the Nebraska Supreme Court, McLeay had asserted as error, four issues summarized by the Nebraska Supreme Court as follows:

> That the District Court erred (1) determining that Bergan was immune under the HCQIA; (2) failing to find that there were issues of material fact about the requirements to report and the falsity of the reports or malice in submitting them, which issues affect immunity; (3) failing to determine that immunity did not apply to equitable claims; and (4) determining that McLeay had waived his claims against Bergan.

McLeay did not make any assignment of error that the Court had applied an improper standard for purposes of summary judgment under HCQIA. The Nebraska Supreme Court held that under § 11112(a) of HCQIA, Bergan is presumed to reasonably believe that it was acting in the furtherance of quality care in taking action against McLeay and that McLeay failed to present evidence sufficient to overcome the presumption. The Court specifically found "McLeay failed to meet his burden to present evidence that would allow a reasonable jury to conclude that Bergan's peer review process failed to meet the standards of the HCQIA." The Nebraska Supreme Court did note that "in cases involving the use of expert testimony after the fact to show that the standard of care was actually met, courts uniformly hold that the testimony will not rebut the presumption." The Court further distinguished the case of the Tenth Circuit Court of Appeals case of *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324 (10th Cir. 1996) on the basis the *Brown* court allow the use of experts to testify about the review process itself. In *Brown*, the experts had concluded the defendants were not acting to further quality health care. The Supreme Court specifically found plaintiff's expert witness testimony did not rebut the presumption of reasonableness. One expert was noted to have provided no specifics about how the

standard of care was met or what the standard of care was and the other expert did not provide any testimony about surgical standard of care.

The Nebraska Supreme Court affirmed the District Court on the finding of immunity under HCQIA for McLeay's claim for money damages. However, the Nebraska Supreme Court reversed and remanded the case back for further proceedings as to McLeay's claim for equitable relief. The Nebraska Supreme Court held HCQIA immunity applies to suit for money damages but does not provide immunity for actions seeking equitable relief. Since McLeay, in addition to seeking damages also sought reinstatement of his privileges as a remedy, the case was remanded back for further proceedings on the question of McLeay's equitable relief.

ARGUMENT

I. Lack of Finality

As basis for jurisdiction, McLeay asserts the statutory provision of 28 U.S.C. § 1257 (2000) and suggests the Opinion of the Nebraska Supreme Court as set forth in Appendix at A-1 is a "final opinion." Section 28 U.S.C. § 1257(a) provides:

> *Final judgments or decrees* rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by Writ of Certiorari where the validity of a decree or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or

> laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. *Emphasis supplied.*

The Nebraska Supreme Court decision in question sets forth in the Appendix at A-1 to A-21 and reported at *McLeay v. Bergan Mercy Health Systems Corp.*, 714 N.W.2d 7 (Neb. 2006) is not a final judgment. McLeay had assigned as error the trial court's application of the HCQIA immunity to McLeay's equitable claim for reinstatement of hospital privileges. The Nebraska Supreme Court noted a few cases have applied HCQIA immunity to equitable claims for reinstatement without analyzing the issue. Instead of following this precedent, the Court looked at the language of HCQIA and specifically 42 U.S.C. § 11111 and found that it states it applies to suits for money damages and concluded the statute does not include actions seeking equitable relief.

As to the equitable claim for reinstatement, the Nebraska Supreme Court further noted the District Court had not considered Bergan's claim of waiver for failure to exhaust administrative remedies. The Court wrote: "Accordingly, we reverse and remand for further proceedings to determine whether McLeay is entitled to equitable remedies." The Court further wrote: "We also determine, however, that McLeay's claim for equitable relief are not subject to HCQIA immunity, and he may be able to proceed on those claims if they were not waived. Because the District Court did not pass on that topic, we reverse the summary judgment to the extent it affects claims for equitable relief and remand the case for further proceedings."

In *Jefferson v. City of Tarrant*, Ala. 522 U.S. 75, 118 S.Ct. 481, 139 L.Ed. 2d 433 (1997), this court declined to exercise certiorari jurisdiction regarding a claim that a wrongful death resulted from deprivation of federal rights under 42 U.S.C. § 1983, where the Alabama Supreme Court had remanded the case for resolution of the remaining state law claims. The court noted:

> Congress has limited our review of state – court decisions to "final judgments or decrees rendered by the highest court of a state in which a decision could be had." 28 U.S.C. § 1257(a). The decision we confront does not qualify as a "final judgment" within the meaning of § 1257(a).

The state court case had been remanded by the Alabama Supreme Court for further proceedings on state-law claims, the outcome of which could moot the federal question presented in the case. The court dismissed the Writ of Certiorari for want of a final judgment. See also *O'Dell v. Espinoza*, 456 U.S. 430, 102 S.Ct. 1865, 72 L.Ed. 2d 237 (1982).

In this case, some but not all of Petitioner's claims have been resolved. The further unique issue here is that Petitioner has asserted no federal claims for relief. Rather, the federal issue arose because of the Hospital's ability to raise the immunity under HCQIA. The Nebraska Supreme Court decision was not yet final, as it is on remand to the state court to make a determination on the equitable claim for reinstatement of privileges.

II. No Conflict With Decisions Regarding Relevance of Expert Testimony Under HCQIA

The decision of the Nebraska Supreme Court does not conflict with the decision of this Court nor with any Court of Appeals including the Tenth Circuit Court of Appeals. Accordingly, Petitioner has not carried his burden demonstrating any "compelling reasons" for the Petition for Writ of Certiorari to be granted. See Sup. Ct. R. 10. McLeay asserts the Nebraska Supreme Court was wrong along with a majority of other courts in interpreting the 42 U.S.C. § 11112(a) of HCQIA. The Nebraska Supreme Court and the majority of other jurisdictions have "overwhelmingly held that a physician's showing that the standard of care was met, or that the Professional Review Board reached the wrong conclusion, does not meet the burden of overcoming the presumption of a reasonable belief that the hospital's furthering health quality health care." Generally, it has been held that expert testimony as to the quality of the physician's care is irrelevant to the inquiry as to whether the hospital acted on a reasonable belief. See *Sugarbaker v. SSM Health Care*, 190 F.3d 905, 913 (8th Cir. 1999); *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624 (3d Cir. 1996); *Imperial v. Suburban Hosp. Ass'n*, 37 F.3d 1026 (4th Cir. 1994); *Egan v. Athol Memorial Hosp.*, 971 F. Supp. 37 (D. Mass. 1997; *Meyer v. Sunrise Hosp.*, 22 P.3d 1142 (Nev. 2001).

McLeay's argument here is that the Nebraska Supreme Court decision and the overwhelming majority of other cases interpreting HCQIA conflicts with the Tenth Circuit case of *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324 (10th Cir. 1996). *Brown* is the only reported decision which appears to have language suggesting expert testimony about the standard of care may be used

to rebut a presumption of reasonableness under HCQIA. However, as noted by the Nebraska Supreme Court, the *Brown* case has been distinguished by other courts under the unique facts of the case. In *Brown*, the expert testimony did not focus solely upon the question of the physician's compliance with the standard of care, but also opined with respect to the review panel process itself. The Nebraska Supreme Court noted other courts had distinguished *Brown* because of the unique facts and quoted extensively from *Meyer v. Sunrise Hosp.*, 22 P.3d 1142 (Nev. 2001) as follows:

> While *Brown* does discuss the use of expert testimony in evaluating issues of immunity under HCQIA, the decision of *Brown* centered upon the fact that Dr. [Arlene] Brown was able to produce significant evidence to support her allegations that information submitted by the defendants in her medical review process was false or misleading. Indeed, Dr. Brown produced evidence that the individuals who investigated her actions were involved in encouraging another doctor to move his practice so as to be in direct competition with her. In other words, the defendants in *Brown* had conspired to manufacture allegations of improper behavior by Dr. Brown so as to put Dr. Brown out of business. In the setting, Dr. Brown's expert concluded that the defendants were not acting to further quality health care. Neither were their actions reasonable under the facts of the case. It was for this reason that the Federal District Court in *Brown* refused to grant summary judgment on the basis of HCQIA immunity, a decision that was affirmed by the United States Court of Appeals for the Tenth Circuit.

Finally, the Nebraska Supreme Court noted factually the testimony of McLeay's experts "cannot rebut the presumption." The presumption is focused on what the review panel knew when it acted. Therefore, later expert testimony that "McLeay acted appropriately in the cases reviewed cannot be used ' ' rebut the presumption." In describing the testimony of McLeay's experts, the Nebraska Supreme Court noted one expert "did not provide details about the standard of care" and "did not provide specifics about how the standard of care was met or what the standard of care was." As to the other expert, he was not a surgeon, did not assist in surgery and did not provide testimony about the surgical standard of care at issue. Thus, under the facts of the case even if a broad interpretation of the *Brown* case were to be followed by the Nebraska Supreme Court, Petitioner's claim would fail as the proferred expert testimony was factually insufficient to rebut the presumption of immunity.

III. There Is No Conflict as to the HCQIA Immunity Burden of Proof Standard and Petitioner Never Claimed Error Regarding the Burden of Proof

Petitioner asserts a conflict exists between the United States Court of Appeals for the Tenth Circuit and most other courts regarding whether HCQIA's rebuttal presumption modifies the standard by use for granting summary judgment. Said assertion is made without citing the Tenth Circuit case that purportedly applied the familiar summary judgment standard of Fed.Civ.P. 56 to questions of immunity under HCQIA. One would suppose the Petitioner may be looking to the *Brown*, supra, decision of the Tenth Circuit. As noted by Petitioner, the majority of

the courts and the Nebraska Supreme Court concluded that HCQIA "adds a rather unconditional twist to the burden of proof in our summary judgment standard of review . . . [a] court must determine whether the physician satisfied his or her burden of producing evidence that would allow a reasonable jury to conclude that the hospital's peer review process failed to meet the standards of the HCQIA . . . [T]he the presumption means that the plaintiff bears the burden of proving that the review process was not reasonable." Respondent would note that this is the very same standard used in the Tenth Circuit case of *Brown*, supra. The *Brown* court had simply found under the facts of the case, the presumption had been rebutted by plaintiff's evidence. The court wrote:

> Thus, in determining whether a peer review participant is immune under the Health Care Quality Improvement Act, the proper inquiry for the court is whether Dr. Brown has provided sufficient evidence to permit a jury to find she has overcome, by a preponderance of the evidence, any of the four statutory elements required for immunity under 42 U.S.C. § 11112(a). See, e.g., *Austin*, 979 F.2d at 734. In this case, we believe Dr. Brown presented sufficient evidence to overcome the presumption and allowed the issue to be decided by the jury. (Footnote 9 at 1324).

Second, Petitioner never assigned as error before the Nebraska Supreme Court that the trial court had applied an incorrect standard of review with respect to the summary judgment burden of proof of HCQIA immunity. The Nebraska Supreme Court summarized McLeay's Assignments of Error as follows:

1. Determining that Bergan was immune under the HCQIA.
2. In failing to find that there were issues of material fact about the requirements to report and the falsity of the reports or malice in submitting them, which issues affected immunity.
3. In failing to determine that immunity did not apply to equitable claims and
4. Determining that McLeay had waived his claims against Bergan.

App. A-9.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition for Writ of Certiorari and has failed to demonstrate certiorari jurisdiction. Therefore, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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